

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969

Office Supreme Court, U.S.
FILED
AUG 22 1969
JOHN F. DAVIS, CLERK

No. 370

GEORGE E. FARRELL, as Administrator de bonis non of the Estate of WYAND F. DOERNER, JR., deceased,
DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,
JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,
ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,
GERALD A. ROBBIE, as Administrator de bonis non with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,
PAUL S. EDELMAN, as Administrator de bonis non with will annexed of the Estate of ELLEN S. LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,
Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,
Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,
Respondents.

BRIEF OF THE RESPONDENT LANSEAIR, INC. AND THE GARNISHEE THE FEDERAL INSURANCE COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN M. AHERNE
JOHN J. MARTIN
JOE C. GREENE
Counsel for Respondent Lanseair Inc. and The Garnishee The Federal Insurance Company

TABLE OF CONTENTS

	PAGE
STATEMENT OF CASE	3
THE PETITION FOR CERTIORARI	6
POINT I—The history of the *Seider* procedure amply demonstrates that its sole purpose is to protect residents of the State of New York. There are no New York residents to be protected in this litigation. Consequently this Court should deny certiorari	7
POINT II—The courts below properly applied New York law as it existed. The mandate of *Erie* v. *Tompkins* was explicitly observed	11
POINT III—Forcing Lanseair or any similarly situated defendant to defend itself as required by *Seider* violates the due process clause	12
CONCLUSION	13

TABLE OF CASES

Erie v. Tompkins, 304 US 64 (1937) 6, 11

International Shoe Co. v. Washington, 326 US 310 (1945) 12

Minichiello v. Rosenberg, 410 F2d 106 (1968) (affirmed on rehearing 410 F2d 117 (1969) 8, 12

Seider v. Roth, 17 NY 2d 111 (1966) 4, 5, 6, 7, 8, 9, 11, 12, 13

Simpson v. Loehmann, 21 NY 2d 305 (1967), reargument denied, 21 NY 2d 990 (1968) 8, 9

Southern Railway Co. v. Mayfield, 340 US 1 (1950) 10

Toomer v. Witsell, 334 US 385 (1947) 10

Vaage v. Lewis, 29 AD 2d 315 (2nd Dept. 1968) 8, 12

Watson v. Employers Liability Assurance Corp., 348 US 66 (1954) 10

IN THE

Supreme Court of the United States

October Term, 1969

No. 370

GEORGE E. FARRELL, as Administrator de bonis non of the Estate of WYAND F. DOERNER, JR., deceased,
DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,
JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,
ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,
GERALD A. ROBBIE, as Administrator de bonis non with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,
PAUL S. EDELMAN, as Administrator de bonis non with will annexed of the Estate of ELLEN S. LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,
Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,
Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,
Respondents.

BRIEF OF THE RESPONDENT LANSEAIR, INC. AND THE GARNISHEE THE FEDERAL INSURANCE COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This Brief is submitted on behalf of Lanseair Inc. and its aircraft liability insurer in opposition to the Petition for a Writ of Certiorari arising out of a mid-air collision between aircraft owned by Piedmont and Lanseair on July 10, 1967 near Hendersonville, North Carolina. The action was commenced in the United States District Court for the Southern District of New York. It is brought by non-residents against other non-residents who had no contacts with New York and arises out of an occurrence in another state.

Jurisdiction was based upon a contrived diversity of citizenship between nominal plaintiffs who are in New York and the various non-New York corporations. *In personam* jurisdiction was obtained over the defendants Piedmont Aviation Inc., The Boeing Company, and the United States of America. Thereafter petitioners sought to obtain *quasi in rem* jurisdiction over Lanseair, Inc. and Rapidair, Inc. by attaching the aircraft liability insurance policies issued respectively by The Federal Insurance Company and the St. Paul and Marine Insurance Company respectively.

Subsequently Lanseair, Rapidair, and their insurance companies moved to vacate the attachments, set aside the services of process and dismiss the actions against them. The Honorable Inzer B. Wyatt, United States District Court Judge, Southern District of New York granted the motions. *Farrell et al.* v. *Piedmont et al.*, 295 F. Supp. 228 (23-29).* On appeal, the United States Court of Appeals for the Sec-

* Unless otherwise designated, numbers in parentheses refer to pages of the Petition for Certiorari.

ond Circuit unanimously affirmed the decision below. *Farrell et al. v. Piedmont et al.*, —— F 2d —— (13-23).

The petitioners argued below, as they do here, that the Law of the State of New York permits the attachments in this action for the benefit of non-residents. Both the District Court and the Court of Appeals specifically rejected this argument. Among other things the lower courts held that such a denial did not violate either the Equal Protection or the Privileges and Immunities Clauses of the Constitution. A more detailed "Statement of the Case" will put the arguments of the Petitioners and the lower courts' rulings thereon in proper perspective.

Statement of the Case

These actions for wrongful death are being prosecuted by the personal representatives of the estates of thirteen (13) of the passengers who were aboard a Piedmont Airliner 727 Jet, manufactured by the Boeing Company, which collided with a Cessna 310 aircraft owned by Lanseair over Hendersonville, North Carolina. All seventy-four (74) passengers and five (5) crew members aboard the airliner as well as the pilot and two (2) passengers in the Cessna were killed.

The small plane was owned by the Respondent Lanseair, a Missouri Corporation. It was being operated by an employee of the Respondent Rapidair, also a Missouri Corporation. At all times referred to in the complaint and at all the times referred to in this proceeding, Lanseair was and still is a Missouri Corporation with its principal place of business in Missouri. None of Lanseair's officers or employees were residents of New York and Lanseair did no

business in New York. Thus Lanseair was not subject to *in personam* jurisdiction in New York. The only contact which Lanseair had with the State of New York was the fact that Federal, it's insurer, was doing business in the State.

Eight (8) of the deceased passengers represented herein were citizens of Mississippi, one (1) of Texas, two (2) of Tennessee and two (2) of Maryland. The beneficiaries of these wrongful death actions also reside in those several states. None of the tickets were purchased in New York, nor did the transportation call for flights from, to, or over the State. Indeed none of the deceased passengers had any contacts whatsoever with the State of New York. Their only contact came from the appointment of New York residents as Administrators.

The petitioners, all New York residents, were appointed as administrators by the Courts of the domiciles of their respective decedents. They were appointed solely for the purpose of maintaining these actions in the State of New York. Seven replaced executors previously named in the various other state courts.

Plaintiffs' attempt to obtain jurisdiction over Lanseair and Rapidair was based upon the decision of *Seider* v. *Roth*, 21 NY 2d 111 (1966), which permits a plaintiff to obtain *quasi in rem* jurisdiction over a non-resident defendant by attaching the liability insurance policy issued to the non-resident defendant. *In personam* jurisdiction was obtained over Piedmont, Boeing and the Government.

Following the attachment of its liability policy, Lanseair and Federal moved to vacate the attachment and to dismiss the complaints as to Lanseair. Similar motions were made by Rapidair and St. Paul. A motion to transfer this litigation was also submitted on behalf of the other defendants. In the course of their argument Petitioners claimed, among other things, that it was necessary to proceed in New York as they did because New York was the only state in which all defendants could be reached in one suit. Respondent demonstrated however that suits could be brought in North Carolina where all defendants could be reached.

After argument Judge Wyatt granted the motion of Lanseair and Rapidair and their insurers (23-28). He pointed out that the significant difference between *Seider* and the instant litigation was that the plaintiff in *Seider* was a New York resident. Thus he concluded that the *Seider* principle was not applicable to this litigation. He also pointed out that since he was transferring the action to North Carolina both Lanseair and Rapidair could be served in that State and would be required to defend the suit along with the other defendants.

The Court of Appeals for the Second Circuit affirmed. In its opinion (15-23) it pointed to the absolute lack of New York contacts except for the insurer's doing of business in the State of New York. Acknowledging the fact that the nominal plaintiffs had no real interest in the individual death claims, the Court of Appeals concluded that a court of another state could not supply a meaningful contact merely by picking a New York resident as administrator of the estate of a non-resident decedent.

Questions of constitutionality of the *Seider* procedure were raised by Lanseair and Federal at the trial level and in the Court of Appeals. It was contended that this attachment violates due process and is therefore unconstitutional. Both courts avoided the question by ruling that the *Seider* procedure does not apply to the instant fact situation because of the non-residency of the plaintiffs. However, both courts seem to have agreed that the attachment procedure is constitutional when employed by plaintiffs actually resident in New York. Further the Court of Appeals stated "we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth* in favor of non-residents would be exceedingly serious" (22)

The Petition for Certiorari

In an effort to reach this Court petitioners argue discrimination and equal protection. They also seek to establish that the lower court failed to follow the mandate of *Erie* v. *Tompkins* by not applying New York law. Neither contention forms a valid basis for granting certiorari. The courts below have clearly and completely dealt with the discrimination and equal protection arguments. There was no discrimination here and petitioners have equal protection. Furthermore, the courts below followed the New York decisions to the letter in ruling against petitioners.

POINT I

The history of the *Seider* procedure amply demonstrates that its sole purpose is to protect residents of the State of New York. There are no New York residents to be protected in this litigation. Consequently this Court should deny certiorari.

If there is any justification for the *Seider* procedure, which we doubt, it is the expressed desire to protect the residents of the State of New York. This social concept has led to many new and somewhat extraordinary and controversial conclusions in the decisional law of New York. In the instant case there are no New York residents to protect. The courts below have demonstrated that the New York law has absolutely no connection with this multiple litigation other than the fact that the insurers of Lanseair and Rapidair do business in New York.

The question of residency of the plaintiff has been considered closely by the Courts of New York in each of the *Seider* procedure cases. *Seider* v. *Roth,* 17 NY 2d 111, (1966) dealt with a New York resident plaintiff. Chief Judge Desmond speaking for the majority of the court in *Seider* wrote:

> "* * * there is no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont *injuring New York residents* any more than there was in *Oltarsh* v. *Aetna Ins. Co.* (15 N.Y. 2d 111) where for the first time we held that *when New York residents* were injured outside the State we would allow a direct action in New York against the insurer although there was nothing in previous New York law permitting it." (pp. 114-115). (Emphasis ours.)

In *Simpson* v. *Loehmann*, 21 NY 2d 305 (1967) reargument denied 21 NY 2d 990 (1968), Chief Judge Fuld reiterated the necessity for New York residence. He said:

> "Moreover *where the plaintiff is a resident of the forum state* and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York such factors loom large." (p. 311). (Emphasis ours.)

Another New York state court decision, *Vaage* v. *Lewis*, 29 AD 2d 315 (2nd Dept. 1968), reached a similar result where a non-resident sought an attachment under *Seider*. Like the case at bar the solitary nexus for the New York Courts in *Vaage* was the fact that the defendant's insurance company was authorized to do business in New York. A similar conclusion was reached by the Court of Appeals for the Second Circuit in *Minichiello* v. *Rosenberg*, 410 F2d 106 (1968) affirmed on rehearing 410 F2d 117 (1969), Petition for Certiorari filed with this court on May 29, 1969.

This was the history which the Second Circuit had before it when it considered the instant matter. Considering the jurisdictional facts in the light of this history, Judge Friendly wrote for the unaminous court:

> "Whatever the conceptual beauty of the (plaintiffs') argument, it neglects the facts. If we pass the New York citizenship of the administrators for the moment, *the action is by nonresidents against other nonresidents who have no contacts with New York, and arises*

out of an occurrence in another state. In truth the defendants 'own' nothing in New York or at least nothing that they do not own to the same extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are *absolutely no New York contacts except for the doing of business by the insurers,* we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants." (20-21) (Emphasis ours.)

* * *

"For reasons sufficiently indicated in *Minichiello* v. *Rosenberg, supra,* ..... F. 2d at ....., slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth,* in favor of nonresidents would be exceedingly serious. While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresidents representatives of nonresidents who had been killed." (22)

Clearly therefore the Second Circuit acted properly in affirming Judge Wyatt's vacatur of the attachment. The only constitutional justification for the *Seider* "miracle" was the residence of the plaintiff. In effect, the New York Court of Appeals judicially created a direct action statute for the benefit of its residents. Indeed Judge Keating's concurrence in *Simpson* assumed that the Court of Appeals had created such a direct action procedure and that it was constitutional. *Simpson* v. *Loehmann,* 21 NY 2d 305, 312-14.

As this Court is aware statutes of this type have been held constitutional, *Watson* v. *Employers Liability Assurance Corp.*, 348 US 66 (1954). However in approving direct action procedures this Court has been careful to point out that they are justified only because they are directed to protect the interests of the residents of the State involved.

Contrary to petitioners' contention this desire to protect its citizens does not lead to a finding of discrimination or denial of equal protection. This exact point has been considered by this Court on several occasions. In *Toomer* v. *Witsell*, 334 US 385 (1947) at page 396 this Court pointed out that these constitutional provisions are not absolute. It said:

> "Like many other constitutional provisions the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."

Justice Frankfurter speaking for this Court in *Southern R. Co.* v. *Mayfield*, 340 US 1 (1950) discussed preferences given to residents of one state over another. He said at page 4:

> "But if a State chooses to [prefer] residents in access to often overcrowded Courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This

is true also of actions for personal injuries under the Employers Liability Act. *Douglas* v. *New York, N.H. & H.R. Co.*, 279 US 377, 387. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."

POINT II

The courts below properly applied New York law as it existed. The mandate of *Erie* v. *Tompkins* was explicitly observed.

The foregoing discussion of the status of the New York law on the *Seider* procedure amply demonstrates compliance by the Courts below with the mandate of *Erie* v. *Tompkins*, 304 US 64 (1937). Petitioners' argument seeks to confuse the clear purpose and intent of the New York Court of Appeals in arriving at this judicially created direct action statute. The same arguments were presented to the Second Circuit. It was answered by Judge Friendly when he concluded that "whatever the conceptual beauty of the argument, it neglects the facts" — F.2d— at p. —. (20)

Petitioners' argument also neglects the existing decisional law. Apparently it is petitioners' contention that since the highest court of the State of New York has never denied an attachment sought by a non-resident, the law on the question is contrary to that applied by Judge Wyatt and the Second Circuit. This is not the mandate of *Erie* v. *Tompkins*. We have already demonstrated a clear consideration of this question by the highest courts of New

York State. On two separate occasions the Court of Appeals has specifically noted the importance of the residence of the plaintiff.

Furthermore there is a decision on the very point by an Appellate Court. The highest New York court which has considered the specific question of attachment attempt by a non-resident was the Appellate Division, Second Department. In *Vaage* v. *Lewis,* 2d AD 2d 315 (1968) that court denied the attachment pointing specifically to the non-residence of the plaintiff.

POINT III

Forcing Lanseair or any similarly situated defendant to defend itself as required by *Seider* violates the due process clause.

The course of this litigation and the decisions below do not require this Court to consider the constitutional objection that *Seider* violates the due process clause. However in view of the fact that a Petition for Certiorari was filed on May 29, 1969 in *Minichiello* we believe this court should be made aware of the enormity of the complications to which *Seider* has given birth.

To say the least *Seider* violates the "traditional notions of fair play and substantial justice" referred to by this Court in *International Shoe Co.* v. *Washington,* 326 US 310, 316 (1945). We say this particularly when the impact of *Seider* is reviewed in a multiple disaster situation—where there are many plaintiffs seeking relief against a number of defendants in several jurisdictions. Furthermore

Seider, interpreted as Petitioners argue, would force Lanseair to defend itself in New York or face the possibility of a default judgment and subsequent rulings of collateral estoppel or res judicata. Petitioners' interpretation would also deprive other plaintiffs in other jurisdictions of an opportunity to benefit from the insurance protection afforded to Lanseair. If the policy limits are exhausted by way of attachment in one state, all other plaintiffs will be without financial relief except against the corporate defendant which often is without substantial assets.

CONCLUSION

This petition should be denied. The decisional law of the State of New York supports the lower courts' conclusions that non-residents are not entitled to *Seider* relief. This judicially created direct action statute for the benefit of New York residents is neither discriminatory nor a denial of equal protection.

Respectfully submitted,

JOHN M. AHERNE
JOHN J. MARTIN
JOE C. GREENE
Counsel for Respondent
Lanseair Inc. and The Garnishee
The Federal Insurance Company